Supreme Court, U. S.
FILED
AUG 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-95

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION AND DEPARTMENT OF TRANSPORTATION,
Petitioners

v.

PACCAR, INC., *et al.*

BRIEF OF TRUCK EQUIPMENT AND BODY DISTRIBUTORS ASSOCIATION (TEBDA) IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Statement of the Case	1
A. TRUCKS ARE BUILT IN STAGES, THE FINAL STAGE OF NECESSITY TAKING PLACE AT THE LOCAL LEVEL BY SMALL BUSINESSES—TEBDA'S MEMBERS	1
B. TEBDA'S COMPLAINT LIMITED TO ONLY ONE PROVISION OF THE STANDARD AND ONLY AS IT WAS APPLIED AGAINST THE FINAL STAGE MANUFACTURER	7
C. NINTH CIRCUIT DECISION IN TEBDA'S CASE IS BASED UPON THE SPECIAL LIMITED FACTS OF THAT CASE, NO ISSUES OF LAW BEING IN DISPUTE	10
Argument	13
A. THE NINTH CIRCUIT'S LIMITED OPINION BASED UPON FACTUAL INQUIRY OF AN EXTENSIVE RECORD DOES NOT WARRANT THIS COURT'S INTERVENTION	13
B. TEBDA'S MEMBERS ARE IN AN UNTENABLE POSITION DUE TO PETITIONERS' ACTIONS AND THE GRANTING OF THE PETITION WOULD MATERIALLY WORSEN THE SITUATION AND DETERIORATE HIGHWAY SAFETY	14
C. PETITIONERS' REASONS FOR GRANTING THE PETITION RAISE ISSUES NOT PRESENTED AND ARE INSUFFICIENT	16
Conclusion	19

CITATIONS

Cases:	Page
Chrysler Corp. v. *Department of Transportation*, 472 F.2d 659, 675 (CA6, 1972)	8
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)	11
Haske et al v. *Scientific Brake Co. et al*, Civil Action No. 77-0015-3-NI, Circuit Court Saginaw County, Michigan	15
Statutes and Regulations:	
15 U.S.C. 1381, et seq.	8
15 U.S.C. 1392(a)	8, 9, 11
15 U.S.C. 1397	8, 12
15 U.S.C. 1397(a)(1)(C)	11
15 U.S.C. 1397(c)	8
15 U.S.C. 1398	8
15 U.S.C. 1400	12
15 U.S.C. 1403	8

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Respondent, Truck Equipment and Body Distributors Association (called TEBDA) files the following Brief in opposition to Respondents' Petition for a Writ of Certiorari.

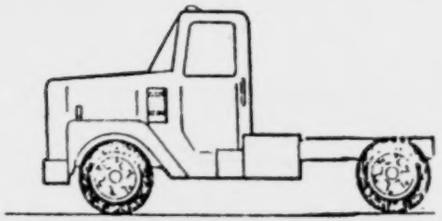
STATEMENT OF THE CASE

A. TRUCKS ARE BUILT IN STAGES, THE FINAL STAGE OF NECESSITY TAKING PLACE AT THE LOCAL LEVEL BY SMALL BUSINESSES—TEBDA'S MEMBERS

In order to appreciate the logic and correctness of the Ninth Circuit Court of Appeals' Opinion, it is neces-

sary to understand the often misunderstood structure of the truck-building industry. The following description, found in TEBDA's Brief to the Ninth Circuit, pages 3-9, presents, in summary form, the structure of this industry and is properly not disputed by Petitioner:

—The average layman usually assumes that trucks [covered by MVSS-121] are produced by GM, Ford, PACCAR, International Harvester, Mack, etc. This is incorrect. These companies mass produce various standardized models of a "chassis-cab". The following illustration is a typical example of a chassis-cab:



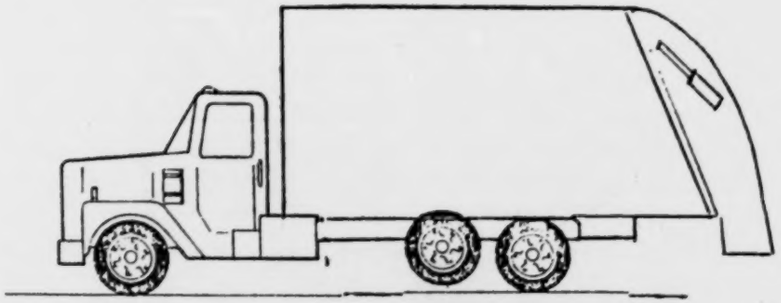
CHASSIS-CAB

Sometimes instead of one rear axle, GM, etc., will provide two (called a tandem). But in either event one can see that "chassis-cabs" are bare bones items capable of being produced by highly efficient mass production assembly line techniques. PACCAR [Co-Respondent] represents this segment of the truck-producing industry, i.e., the first vital segment which mass produces a "chassis-cab". NHTSA's [Petitioner] regulations refers to this segment as "incomplete vehicle manufacturers".

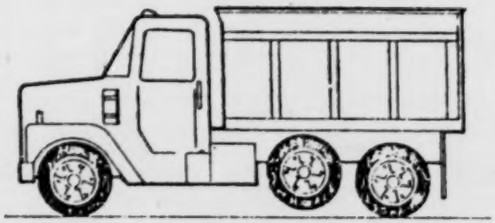
The second vital segment in the production of a *truck* is represented by TEBDA. This segment takes a "chassis-cab" and installs on it a body, add-on axle and cross-members and does the necessary frame and other work,

thereby to build a *truck* to meet local specifications, needs, safety requirements and laws.

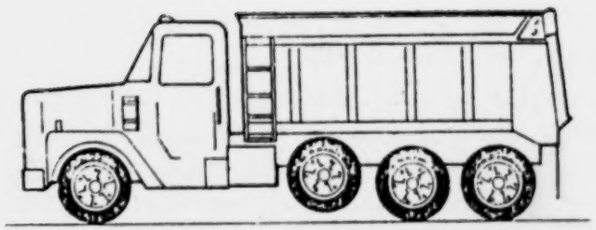
This second segment is referred to in NHTSA's regulations as "intermediate" or "final stage" manufacturers (hereinafter referred to as *final stage* manufacturers since the difference is irrelevant for this litigation). The final stage manufacturing segment of the truck-producing industry is generally comprised of about 2500 small independent local businesses having annual sales volumes of less than three million dollars ($3,000,000) and averaging about seventeen (17) employees. The following are exemplary of typical *trucks* produced by TEBDA's segment of the industry:



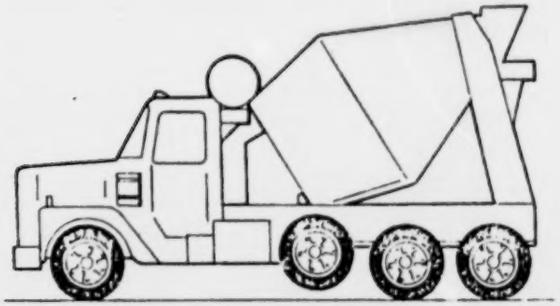
GARBAGE TRUCK
(Garbage Collector, Add-on Lift Axle, Extended Frame)



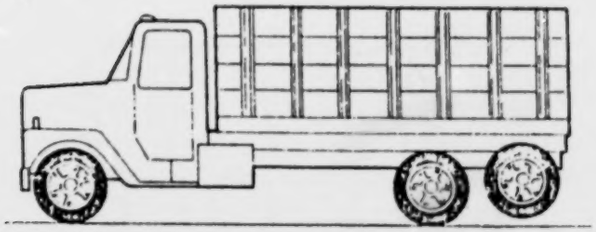
DUMP TRUCK
(Dump Body, Add-on Lift Axle)



DUMP TRUCK
(Dump Body, Add-on Axles, Extended Frame)



CEMENT TRUCK
(Cement Mixer, Add-on Axles, Extended Frame)



GRAIN TRUCK
(Grain Body, Add-on Tag Lift Axle, Extended Frame)

As can be seen, a *truck* within the correct meaning of this word is a combination of: (1) a chassis-cab selected from among several chassis-cab models and makes, (2) a utility body designated for a specific end use and (3) add-on equipment such as lift axles to meet local safety and weight law requirements, to maximize profit and to minimize in many instances fuel consumption. The work done to combine these components usually entails lengthening or shortening air hoses, moving equipment and/or lengthening the chassis-cab frame.

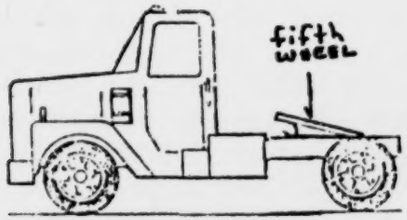
The importance of producing trucks in two stages is apparent. Mass production of standardized models of chassis-cabs keeps costs down, provides efficiency and insures uniformity of the basic component of the truck. But this cannot be done at the second stage. Differences in state weight laws, local terrain, weather conditions and end uses mandate that trucks be constructed and customized at the local level. Slag haulers for the hot steel slag pits of Ohio are not constructed the same way as urban garbage collectors that must maneuver the narrow streets of San Francisco or New York, or the grain vans of our mid-western flat wheat belt. TEBDA's members are highly skilled local craftsmen, trained in local needs, laws, and conditions, who perform this vital second step which results in the production of a *truck* safe and economically useful in commerce.

The free enterprise system maintains rigorous non-oligopolized competition via these local, independent truck builders through the choice to the consumer of many models and makes of chassis-cabs, bodies, add-on axles (to increase load-carrying capacity) and other add-on equipment. The independent, local final stage manufacturer, therefore, deals on a day-to-day basis with hundreds of permutations and combinations of chassis-cabs, bodies, add-on equipment and manufacturing techniques to custom build each *truck* to meet local needs. Since he is

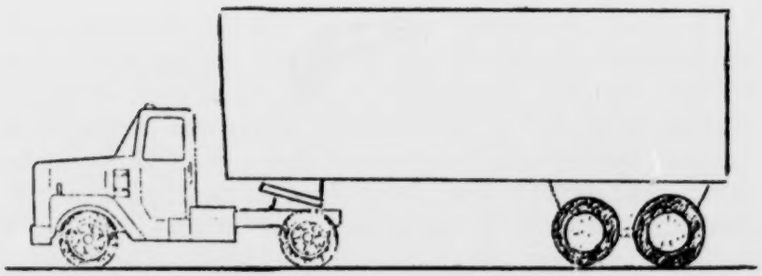
local and *small* he is also uniquely responsive and susceptible to customer complaints and local judicial proceedings.

A hybrid vehicle, legally considered a *truck* under MVSS-121 [the Standard in question here], but not truly one, is a "chassis-cab" which has mounted on it a "fifth wheel". A fifth wheel is a large metal disc which allows a trailer to be connected to the vehicle. The proper term for such a vehicle is a *tractor*, and not a truck. A typical picture of a *tractor* is as follows:

When a *trailer* is hooked to it, it usually appears on our high-speed highways as something like the following picture:



TRACTOR



TRACTOR-TRAILER COMBO.

Petitioner [Co-Respondent] ATA, represents the users (consumers) of these over-the-road tractor-trailers. While TEBDA's members install fifth wheels, such is a rather simple task and the consumer can at times acquire this add-on part and thus a *tractor* from the chassis-cab manufacturer or his franchised dealer. Little if any local (terrain, use, etc.) considerations come into play when installing a fifth wheel.—

As to this structure and TEBDA's standing, the Ninth Circuit made the following correct and undisputed finding of fact in its Opinion:

> "TEBDA represents approximately half of the 'intermediate' and 'final stage' manufacturers in this country. The 'first stage' or 'incomplete' manufacturers build the truck chassis, and TEBDA members modify that chassis to produce dump trucks, cement trucks, garbage trucks, and other trucks." (Pet. 29a-30a)

B. TEBDA'S COMPLAINT LIMITED TO ONLY ONE PROVISION OF THE STANDARD AND ONLY AS IT WAS APPLIED AGAINST THE FINAL STAGE MANUFACTURER

Motor vehicle Safety Standard, MVSS-121 (Pet. 44a et. seq.) is a lengthy and complex standard which prescribes extensive braking equipment and characteristics, and stopping distance requirements for air-braked trucks, tractors and trailers manufactured as described above.

The vast portion of MVSS-121 was uncontested by any of the Respondents and was left, properly, in tact by the Ninth Circuit. Among those provisions unquestioned, for example, are the extensive provisions for: safety equipment such as air compressors, pressure guages, reservoirs, etc.; service brakes and testing thereof; emergency brakes; and parking brakes.

TEBDA complained in its case of nothing in Motor Vehicle Safety Standard No. 121, except the road test requirements as set forth in § 5.3 et. seq. (Pet. 49a et. seq.) and then, only as they apply to the final and intermediate stage manufacturer. The term "final stage" manufacturer was used to cover both for purposes of this litigation and is so used here.

Under § 1397 (Pet. 39a) and § 1403 (Pet. 40a) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381, et. seq., Pet. 34a) and Petitioners' implementing regulations whether old or new (Pet. 30a), in practical effect, for about 90% of all trucks produced, it is the undisputed duty of the final stage manufacturer to certify each truck he produces as complying with every condition specified in MVSS-121, including the fact that if the truck is run through the complex road testing of § 5.3, et. seq., the truck will meet or exceed the required results. Failure of the truck to pass the test or failure of the certifier to use "due care" in ascertaining compliance before certifying, subjects the offender to severe civil penalties, including fines of up to $800,000. (15 U.S.C. 1397 and 1398; Pet. 39a, et. seq.)

Practically speaking, then, Petitioner has the power, through the assessment of a sufficiently large penalty, to put many, if not most, independent, final stage manufacturers out of business if the trucks which they produce are found, when road tested by Petitioner, not to meet the Standard or if they were not certified with "due care" (§ 1397(c); Pet. 39a-40a).

Because of the severity of the penalty, there is a compelling statutory requirement in § 1392(a) (Pet. 34a) that any standard must be set forth in "objective terms". As the Sixth Circuit stated in *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659, 675 (CA6, 1972):

> "The importance of objectivity in safety standards cannot be overemphasized. The Act puts the burden upon the manufacturer to assure that his vehicles comply under pain of substantial penalties. In the absence of objectively defined performance requirements and test procedures, a manufacturer has no assurance that his own test results will be duplicated in tests conducted by the Agency. Accordingly, such objective criteria are absolutely necessary so that 'the question of whether there is compliance with the standard can be answered by objective measurement and without recourse to any subjective determination.'"

The correctness of this legal principle is undisputed and is not in issue here.

In addition to the requirement for "objectivity", the Act, 15 U.S.C. 1392(a) (Pet. 34a) requires that a standard must be "practicable". All agree that the term "practicable" means "feasible in the circumstances". (Pet. 16, fn. 10). Of necessity, then, a judicial determination of "practicable" requires a factual inquiry into the circumstances of the particular situation.

After unsuccessfully making administrative complaints to the Agency, TEBDA complained to the Ninth Circuit (via statutory transfer from the Sixth Circuit) that under the circumstances of the final stage manufacturer, the road test requirement was not "practicable". In point of fact, Petitioner, during the administrative period had admitted to facts which compelled a finding that the road test was economically and physically impossible for the final stage manufacturer to conduct.[1] Petitioner, itself, never disputed this fact and, in effect, admitted it. Yet the standard specified no alternative, but to road test each truck.

The incumbents in NHTSA at the time, faced with these compelling facts and their own admissions, took

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[1] Pet. 30(a), fn 59 Letter to Senator Warren G. Magnuson; 31a, fn 60.

the position that the final stage manufacturer did not have to road test each vehicle because some *unspecified* form of "sample" or "group" testing, mathematical calculations, or the like might be used in place of actually conducting the road tests (Pet. 31a, fn 60) to determine compliance—*with the proviso*, of course, *that* the user of these alternatives could be fined or penalized if, after using them, NHTSA were to review them and find that they did not constitute a "due care" technique, or the truck when tested did not pass the road test.

The problem, of course, as pointed out by TEBDA, was that any "sample" or "group" testing, mathematical calculations (which necessitate gross assumptions) and the like, by definition are *subjective* and give no assurance, with objectivity, that each truck to which they are related actually meets the road test results after being built.

NHTSA specifically and repeatedly refused to publically specify or endorse even one alternative approach (if, indeed, there is one) which the final stage manufacturer could use in place of the road test, leaving TEBDA's members to guess, under penalty of being put out of business if they guessed wrong, as to how to certify their trucks by subjective techniques. TEBDA countered that such guess work, even if it could be in some way accomplished, thus, satisfying the test of "practicable", relegated the final stage manufacturer to a "non-objective" attempt to comply and thus, violated the "objective" criteria of the statute.

C. NINTH CIRCUIT DECISION IN TEBDA'S CASE IS BASED UPON THE SPECIAL LIMITED FACTS OF THAT CASE, NO ISSUES OF LAW BEING IN DISPUTE

Petitioner readily admits that the appropriate rules of law were applied by the Ninth Circuit. For example, page 1 of the Petition states:

> ". . . a decision such as this turns more on the application of acknowledged principles to particular facts than on any dispute about the controlling legal rules."

The controlling "legal rules" in TEBDA's case, as applied by the Ninth Circuit are, of course, that MVSS-121 must be both "practicable" and "objective". (15 U.S.C. 1392(a), Pet. 34a). In reviewing the Agency's determination in this regard, the Ninth Circuit specifically used the restricted reviewing criteria prescribed by this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971). (See Pet. 6a).

Whether the road test requirement of MVSS-121 as it applied to the final stage manufacturer is "practical" and "objective" is obviously a factual determination. After a thorough and searching analysis of the extensive record in this case, covering many thousands of pages and dealing with the total aspects of all three cases, the Ninth Circuit held in TEBDA's case:

> "It is undisputed that it would be economically unfeasible for TEBDA members to road test each vehicle they complete.[59] [2] TEBDA argues, however, that its manufacturers run the risk of violating the "due care" provision of 15 U.S.C. § 1397(a)(1)(C) if they do not road test, since road testing is the only method NHTSA has specified whereby manufacturers can ensure that their vehicles are properly certified.
>
> NHTSA asserts that road testing is not required of the manufacturers, and it is only necessary that any truck manufactured meet the test that it

[2] Footnote 59 of the Opinion reads: "There are only four tests tracks in the United States, and the cost of testing each vehicle is between $2000 and $4000. Letter from NHTSA to the Honorable Warren G. Magnuson (May 1975)."

performs. According to the agency, due care could be satisfied by any number of alternative methods, such as group testing, mathematical calculations, and so forth.[60] [3] TEBDA contends that, since such alternatives are not contained in the regulations, its manufacturers have no assurance that these alternatives will ultimately be found to comply with the due care requirement.

In our opinion, the plain statutory mandate of "practicability" and "objectivity" is not met by agency "suggestions" of what might constitute compliance with the amorphous due care standard. Since NHTSA has admitted that road testing is beyond the practical and financial reach of the final stage manufacturers, it must propose some alternative method for those manufacturers which, if followed, it will recognize as fulfilling the due care requirement.

Our decision in no way invalidates the testing procedures, nor does it affect the requirement that each vehicle sold to a distributor or dealer must conform to a legally appropriate standard. 15 U.S.C. § 1400. We hold only that this regulation is neither "objective" nor "practicable" because it could subject intermediate and final stage manufacturers to the penalties of 15 U.S.C. § 1397 simply because they could not perform the only procedure specified in the regulations for fulfilling the due care provision. Statutes prescribing penalties, civil or criminal, must be drafted without ambiguity. Successive authorities of NHTSA might take an entirely different view than that announced by the incumbents, and subjecting the manufacturers to such risk does not comport with due process requirements. (Pet. 30a-32a).

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[3] Footnote 60 of the Opinion reads: "Letter from NHTSA to TEBDA (Apr. 16, 1975); Letter from NHTSA to TEBDA (Mar. 6, 1975) (denial of Petition for Rehearing); NHTSA References."

ARGUMENT

A. THE NINTH CIRCUIT'S LIMITED OPINION BASED UPON FACTUAL INQUIRY OF AN EXTENSIVE RECORD DOES NOT WARRANT THIS COURT'S INTERVENTION

The decision of the Ninth Circuit as it relates to TEBDA's case is a limited one, based solely on the specific facts of the case, there being no material issue of law involved. The decision specifically does not invalidate the road test of § 5.3 et seq., leaving it fully in tact. It merely states that as to a final stage manufacturer who must certify the finished truck under the regulatory scheme prescribed by Petitioner (Pet. 30a), Petitioner must place in the Standard at least one "practicable" and "objective" alternative to the road test requirement, that a final stage manufacturer can perform to determine if he complies with the standard.

Since Petitioner has argued that the standard can be satisfied with a number of unspecified methods such as "group testing, mathematical calculations, and so forth" (Pet. 31a), all Petitioner needs do is specify one in the Standard by Amendment to insure practicability and objectivity. That process would take but a few months of administrative rulemaking time. In point of fact, this simple amendment process of what amounts to a small portion of one of a plethora of standards promulgated by Petitioner, could be accomplished in significantly less time than it would take this Court to hear and decide this case.

The logic of the factual finding and ruling of the Ninth Circuit is blatantly apparent on the fact of this case. Intervention by this Court would merely serve to delay the inevitableness of this logic going into effect.

B. TEBDA'S MEMBERS ARE IN AN UNTENABLE POSITION DUE TO PETITIONERS' ACTIONS AND THE GRANTING OF THE PETITION WOULD MATERIALLY WORSEN THE SITUATION AND DETERIORATE HIGHWAY SAFETY

As described above, TEBDA's members, the final stage manufacturers, use the chassis-cabs provided to them, to complete the trucks. The anti-lock brake componentry mandated by MVSS-121 comes with these chassis-cabs. TEBDA's members have no control over this componentry. Yet because of the adoption of the product liability doctrine of "strict liability" in almost all states, TEBDA's members are liable for damages arising out of accidents caused by defective anti-lock componentry.

When the defects occur, of course, there are no brakes, and it takes little imagination to picture the nature of the accidents. This problem is compounded for TEBDA's members because they have no way of doing the road test—the only technique specified in the Standard for telling if the truck stops as required—they are usually the *last* manufacturer of the completed truck. They are also immediately accessible to local judicial jurisdiction.

After an exhaustive and lengthy inquiry into the thousands of pages of the record of this case, primarily necessitated in order to decide the cases of PACCAR and ATA as regards anti-lock, the Ninth Circuit confirmed what Congressional staffs, test studies, state highway patrols and others had already found:

> ". . . , the comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been altered to include "overpowered" front axles and anti-lock devices has created a potentially more hazardous highway situation than existed before the Standard became operative." (Pet. 26a)

TEBDA's members are on the local firing line when these hazardous brakes fail, yet they have no control over the fact that they are on the chassis-cab used to complete the truck.

Eaton Corporation, in co-operation with Petitioner, just recently announced a recall of 45,000 anti-lock brakes. According to Congressional staff findings, this amounts to 20% of the anti-lock brakes now on our highways. Many accidents and near misses have been and are being reported. According to Congressional staff findings, 18 deaths have already been directly attributed to anti-lock brake failure, and suits against final stage manufacturers are being brought.[4] The Ninth Circuit, itself, cites a plethora of support for its finding throughout its decision.

To make the situation even more egregious is the fact that the Petitioner, itself, after recently calling off anti-lock requirements as they relate to buses and school buses for safety reasons, is currently in rulemaking, ordered by the Secretary of Transportation, to call a moratorium on anti-lock for trailers. Yet callously, Petitioner stayed the mandate of the Ninth Circuit and announced it would continue to enforce the full measure of MVSS-121 while it sought this Petition.

It is also to be pointed out that the Ninth Circuit's decision does not preclude the use of anti-lock technology. Firstly, there is nothing in the decision which says that it cannot continue to be used. If, under the free enterprise system, a consumer wants anti-lock, he is free to buy and use it. All the decision says is, that until reliable, it should not be universally mandated. In addition, the Ninth Circuit said that Petitioner could remandate anti-lock, rather than continuing to leave it to

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[4] See for example, *Haske et al* v. *Scientific Brake Co. et al*, Civil Action No. 77-0015-3-NI, Circuit Court Saginaw County, Michigan.

the free enterprise system, once it ascertains that anti-lock technology was reliable. The Court stated this latter point most eloquently:

> ". . . until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring heavier axles and the anti-lock device should be suspended. The evidence indicates that this can be accomplished if we hold, as we do, that the stopping distance requirements from 60 mph are invalid. The agency may, of course, continue to propose new standards, including promulgation of new stopping distance requirements to replace those here invalidated. We hold only that more probative and convincing data evidencing the reliability and safety of vehicles that are equipped with anti-lock and in use must be available before the agency can enforce a standard requiring its installation." (Pet. 26a).

NHTSA is holding off on all further action, pending a decision on this Petition. If this Petition were granted, NHTSA would presumably continue to hold off on further study. Highway safety is, thus, in serious jeopardy. Yet in the time it would take to hear this appeal, an appropriate study could be made that would either evolve a better brake system which should be required or leave anti-lock to those areas of the free market place where it is desired and can hopefully be safely used.

C. PETITIONERS' REASONS FOR GRANTING THE PETITION RAISE ISSUES NOT PRESENTED AND ARE INSUFFICIENT

At page 2 of the Petition, Petitioner states that the two questions presented are (1) whether it acted arbitrarily in deeming MVSS-121 to be "practicable" and (2) whether Petitioner must conduct independent tests to

insure that a safety standard promotes rather than deteriorates highway safety.

Presumably correlated to these two questions are the two Reasons for Granting the Petition found at page 14 of the Petition. The first Reason basically states that Petitioner deems the standard to be practicable and the Ninth Circuit was in error on the facts when it ruled otherwise. Petitioner freely admits (Pet. 14) that the Ninth Circuit applied the proper legal criteria for review.

The second reason basically states that the Ninth Circuit was in error when it ruled that NHTSA had mandated, without sufficient investigation, the use of a system that was showing up during public use as a dangerous product. Petitioner, however, makes out a very weak showing in this regard compared to the Ninth Circuit's extensive citation from the record.

Boiled down to its relevant essentials, Petitioner is merely attempting to reargue its side of the facts—a side which the Ninth Circuit after an extensive, lengthy and thorough analysis of the record, and admittedly using the appropriate appellate criteria of review, did not accept. Thus, unless this Court feels it is of such national importance to engage in a judicial review of the voluminous record of this case and redecide that which it took the Ninth Circuit almost two years to decide following final briefing, this Petition should be denied.

Realizing, perhaps, that this Court rarely expends its valuable time on factual re-investigations of small portions of an agency's regulations, Petitioner is attempting to conjure issues from the Ninth Circuit's Opinion that simply do not exist.

For example, under its first question, and after admitting that the proper scope of review was applied (Pet. 14), Petitioner asserts that in holding the road tests impracticable as applied to the final stage manu-

facturer, the Ninth Circuit was actually holding that Petitioner could no longer determine what is and what is not "due care" under the Standard. Probatively, Petitioner fails to cite a single quote from the Opinion in support of this contention. In point of fact, the Ninth Circuit's Opinion never even impliedly raises such a specious issue. And such a contention, to be blunt, distorts beyond all reason the Ninth Circuit's clear and eloquent statement of the case.

Nowhere does the Ninth Circuit question the propriety of statutory "due care". Nowhere does it question or contest NHTSA's authority to investigate and determine whether an individual has used "due care" in certifying a truck—and penalize him if he has not. Nowhere does it restrict "due care" to the use of any particular technique, test or other method—whether specified in the Standard or not. Nowhere does it seek to tell NHTSA that it can or cannot proceed by regulation or on a case-by-case basis to implement statutory "due care". Nowhere does it say or imply that "due care" is unlawfully ambiguous.

The Ninth Circuit merely holds that to be "practicable" the Standard must be implementable by those who will be fined and penalized for not implementing it. In this case a truck, to be lawful, must have certain characteristics defined by the results of a road test. The stage of the industry which will be fined and penalized if a truck does not pass the road test, cannot do the road test. Thus, as to this segment of the industry, rules the Ninth Circuit with infinite logic, the road test is not "practicable". No issue of "due care" whatsoever, arises.

The Ninth Circuit also holds that Petitioner cannot save the road test from its ruling of not being "practicable" by unofficial assurances of then existing agency officials, that the industry is free to invent some unapproved, nonobjective alternative to the road test. The

Ninth Circuit rules that such an informal approach by government officials lacks statutorily required "objectivity". Again, no issue of "due care" arises. In short, "due care" is not an issue in this case.

The other issues raised by Petitioner, such as its allegations that the Ninth Circuit's Opinion in reality requires NHTSA to independently test a new technology, are likewise without merit. Again, it is probative to note the lack of significant citation of the Ninth Circuit's Opinion by Petitioner to establish any of its points—other than to disagree with the fact finding of the Opinion and thereby to reargue the facts. And, in regard to this fact finding, a comparison of the detailed footnoting and reliance on the record by the Ninth Circuit compared to the unsupported allegations of Petitioner is well worth reflection on, in determining whether to grant the Petition.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 1978